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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/825,052	04/04/2001	Bryan Raudenbush	UWHEE-1	1069

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EXAMINER	
MATTHEWS, WILLIAM H	
ART UNIT	PAPER NUMBER
3738	

DATE MAILED: 08/16/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

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Office Action Summary	Application No.	Applicant(s)	
	09/825,052	RAUDENBUSH, BRYAN	
	Examiner	Art Unit	
	William H. Matthews (Howie)	3738	

-- Th MAILING DATE of this communication app ars on th cov r sh et with th correspondenc addr ss --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *13 June 2002* .

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-18* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-18* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11)☐ The proposed drawing correction filed on _____ is: a)☐ approved b)☐ disapproved by the Examiner.

If approved, corrected drawings are required in reply to this Office action.

12)☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

13)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____ .

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

14)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).

a) ☐ The translation of the foreign language provisional application has been received.

15)☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ .
4) ☐ Interview Summary (PTO-413) Paper No(s). _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: .

DETAILED ACTION

Claim Rejections - 35 USC § 102

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claims 1, 10, 12-14, and 16 are rejected under 35 U.S.C. 102(a) as being anticipated by Delmore et al. (EP 1033118).

Regarding claims 1, 10, and 16, Delmore et al. discloses a method of inhaling peppermint oil vapors for increasing athletic performance of humans (see column 1, lines 12-26 of column 1 and lines 9-54 of column 7).

Regarding claim 12, Delmore et al. inherently discloses the administration of peppermint odor through mucous membranes because inhalation of vapors will cause the vapors to contact mucous membranes.

Regarding claim 13, lines 34-52 of column 6 describe the use of peppermint odor releasing polymer.

Regarding claim 14, figure 1 shows an impregnated nasal strip.

3. Claims 1-10, 12, 13, 15, and 16 are rejected under 35 U.S.C. 102(b) as being anticipated by Weil et al. (DE 3931150).

Regarding claims 1, 10, 12, 13, 15, and 16 Weil et al. discloses a method of overcoming bodily or mental fatigue of a human through the use of a peppermint odorant contained within a polymer (the mixture of oils) administered by a 5 cc vessel (see abstract).

Regarding claims 1-9, athletic performance and the limitations of claims 2-9 are inherent aspects of bodily fatigue.

Claim Rejections - 35 USC § 103

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

5. Claims 2-9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Delmore et al. (EP 1033118).

Regarding claims 2-6, Delmore et al. does not specifically disclose the various forms of increased athletic performance. However, speed, strength, endurance, fatigue, and perceived workload are well-understood factors that determine athletic performance. Therefore it would have been obvious to one of ordinary skill in the art at the time of the invention to modify the method disclosed by Delmore et al. by improving athletic performance by adjusting levels of strength, endurance, fatigue, and perceived workload.

Regarding claims 7-9, Delmore et al. does not specifically disclose the athletic performance as either anaerobic or aerobic. However, anaerobic and aerobic athletic performances are well-understood types of athletic performance. Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention to modify the method taught by Delmore et al. to include anaerobic or aerobic athletic performances.

6. Claim 11 is rejected under 35 U.S.C. 103(a) as being unpatentable over Weil et al. (DE 3931150) in view of Xiao (CN 1285154).

Weil et al. meets the limitations of claim 11 except for administration through the mouth. Xiao teaches the administration of peppermint leaf in a liquid tea drink for resisting fatigue (see abstract). Therefore it would have been obvious to one of ordinary skill in the art at the time of the invention to modify the method taught by Weil et al. to include the step of administering peppermint through the mouth of a patient by drinking a tea as taught by Xiao in order to resist fatigue.

7. Claims 11 and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Delmore et al. (EP 1033118) in view of Xiao (CN 1285154).

Delmore et al. meets the limitations of claims 11 and 15 except Delmore et al. does not disclose administering the peppermint odorant through the mouth by a gum, lozenge, or food product. Xiao teaches the administration of peppermint leaf in a liquid tea drink for resisting fatigue (see abstract). Therefore it would have been obvious to one of ordinary skill in the art at the time of the invention to modify the method taught by

Delmore et al. to include the step of administering peppermint through the mouth of a patient by drinking a tea as taught by Xiao for resisting fatigue.

8. Claim 14 is rejected under 35 U.S.C. 103(a) as being unpatentable over Weil et al. (DE 3931150) in view of Cronk et al. (U.S. PN 5,706,800).

Weil et al. meets the limitation of claim 14 except for administering the peppermint odorant by use of a nasal dilator. Cronk et al. discloses the use of a medicated (menthol) nasal dilator for increasing breathing. Therefore it would have been obvious to one of ordinary skill in the art at the time of the invention to modify the method taught by Weil et al. to include administering peppermint on a nasal dilator as taught by Cronk et al. in order to increase athletic performance as well as increase breathing functions.

9. Claim 17 is rejected under 35 U.S.C. 103(a) as being unpatentable over Delmore et al. (EP 1033118) or Weil et al. (DE 003931150) in view of Stephens (The horse scents guide to good health, 2000).

Delmore et al. meets the limitations of claim 17 except Delmore et al. does not disclose the mammal being a horse. Stephens teaches the application of aromatherapy to both humans and horses in order to alleviate physical and emotional problems. Therefore, it would have been obvious to one of ordinary skill in the art at the time of the invention to apply the method taught by Delmore et al. to a horse as taught by Stephens in order to improve physical or emotional problems.

Response to Arguments

1. Applicant's arguments filed June 13, 2002 have been fully considered but they are not persuasive for the reasons described below.

2. ***Claim Rejections - 35 USC § 112***

The rejections under 35 USC 112 have been withdrawn. Examiner notes that Applicant has inadvertently reversed the definitions of retro-nasal and ortho-nasal as is defined in the specification on page 4, lines 14-15.

3. ***Delmore et al (EP 1,033,118) Rejections - 35 USC § 102 and 103***

Applicant contends "Nothing in Delmore would lead one to select peppermint oil from the list of possible medicants for use in a method of enhancing athletic performance". Examiner respectfully disagrees. Delmore et al discloses the use of the device of enhancing athletic performance and lists multiple medicaments for use with such device.

Furthermore Applicant contends that a "medical nasal dilator" is for an entirely different use from enhancing athletic performance. Again, Examiner respectfully disagrees. For example, an asthma sufferer would require a "medical inhaler" in order to increase his or her athletic performance. In the case of the Delmore et al reference, the disclosed nasal dilators may utilize peppermint oil and Delmore et al has clearly stated that dilators may be used to increase athletic performance.

Weil et al (DE 3931150) Rejections - 35 USC § 102

Applicant contends Weil teaches a method to overcome mental and bodily fatigue, and that mental and bodily fatigue are not the same as athletic performance

enhancement. Examiner respectfully disagrees. On page 2, lines 6-15 of Applicant's specification, athletic performance is defined as "any activity which can be measured by increases or decreases in endurance, strength, speed, energy, **perceived workload**, **fatigue**, frustration, and/or intensity." Furthermore, improvement is defined as any measurably better result.

Claim Rejections - 35 USC § 103

Xiao (CN 1285154) discloses administration of peppermint by retro-nasal means and teaches the improvement of fatigue. Again, see page 2, lines 6-15.

Cronk et al. was applied to show obviousness and motivation to apply the method of Weil et al via a nasal dilator, not for attempting to compare increased breathing with increased athletic performance as has been mistakely understood by Applicant.

Stephens was applied to show obviousness and motivation to apply the method of Delmore or Weil et al. to a horse as taught by Stephens. Note that Stephens teaches the smell **excites** the horse, similar to Applicant's use of "**intensity**" on lines 6-7 of page 2.

Conclusion

4. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within

TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to William H. Matthews (Howie) whose telephone number is 703-305-0316. The examiner can normally be reached on Mon-Fri 7:00-4:30 (Every other Friday off).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Corrine M. McDermott can be reached on 703-308-2111. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 308-2708 for regular communications and (703) 305-3590 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0858.

WHM
August 13, 2002

Paul B. Prebilic
Primary Examiner